



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 15, 1998

Mr. Kollin Shadle  
Ms. Harriett L. Haag  
Assistant District Attorneys  
42<sup>nd</sup>, 104<sup>th</sup>, and 350<sup>th</sup> Judicial Districts  
Taylor County Court House  
300 Oak  
Abilene, Texas 79602-1577

OR98-0143

Dear Mr. Shadle and Ms. Haag:

You each ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112323.

The Taylor County Sheriff (the "sheriff") and the District Attorney of the 42<sup>nd</sup>, 104<sup>th</sup>, and 350<sup>th</sup> Judicial Districts (the "district attorney") each received an open records request from an attorney for their respective records pertaining to William Joseph Kitchens, the requestor's client. Because the requestor is acting as an agent of the criminal defendant, you contend that the sheriff and district attorney need not respond to the request pursuant to section 552.028 of the Government Code.<sup>1</sup> In the alternative, you claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code.<sup>2</sup>

---

<sup>1</sup>Section 552.028 of the Government Code was renumbered from Government Code section 552.027 by the Seventh-fifth Legislature. See Act of May 8, 1997, 75<sup>th</sup> Leg., 1<sup>st</sup> R.S., ch. 165, § 31.01(44), 1997 Tex. Sess. Law Serv. 708, 710; Act of June 1, 1997, 75<sup>th</sup> Leg., R.S., ch. 1231, § 6, Tex. Sess. Law Serv. 4701.

<sup>2</sup>You state that you do not object to the release of the following types of information: front page police report data sheet stating the name and address of victims, alleged offense, pertinent dates of alleged commission and reporting, and a brief summary of the alleged criminal offense, affidavit and complaint for arrest warrants, copy of indictment, bond information if applicable, pleadings, motions, and responses filed by the parties, and orders filed by the court.

We note at the outset that the release of some of the records at issue is not governed by the Open Records Act. Among the records specifically sought by the requestor are her client's medical records held by the county jail. The Texas Medical Practice Act provides in pertinent part:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

V.T.C.S. art. 4495b, § 5.08(b). It is not apparent to this office that the procedural requirements for the authorization of the release of the criminal defendant's medical records have been met. *See* V.T.C.S. art. 4495b, § 5.08(j). Upon proper authorization, however, the sheriff must release these medical records to the requestor. *See* Open Records Decision No. 478 (1987) at 2-3 (Open Records Act does not govern special rights of access granted under other statutes).

We now turn to your arguments for non-disclosure of the remaining records at issue. Section 552.028 of the Government Code provides:

(a) A governmental body is not required to accept or comply with a request for information from an individual who is imprisoned or confined in a correctional facility.

(b) Subsection (a) does not prohibit a governmental body from disclosing to an individual described by that subsection information held by a governmental body pertaining to that individual.

(c) In this section, "correctional facility" has the meaning assigned by Section 1.07(a), Penal Code.

By enacting section 552.028, the legislature intended to prevent inmates from using information obtained through the Open Records Act "to file bogus income tax returns on correctional officers, harass nurses at their home addresses, and send mail to the homes of Texas Department of Criminal Justice employees." Tex. Sen. Criminal Justice Comm., Bill Analysis, Tex. H.B. 949, 74th Leg., R.S. (1995) (quoting from "Background") (available through the Senate Research Center). After careful consideration and given the stated purpose of section 552.028, we do not believe that the legislature intended to prevent an attorney, who is subject to rules of professional responsibility, from requesting information on behalf of an inmate whom she is representing. Accordingly, we conclude that section 552.028 does not relieve a governmental body of its obligation to accept and comply with an open records request from an attorney who is representing an inmate. We therefore must

consider whether the requested information falls within the scope of the exceptions to disclosure that you have raised.

Section 552.103(a) of the Government Code, known as the litigation exception, excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

You contend that section 552.103(a) excepts the records at issue from required disclosure because the requestor's client is "actively litigating post conviction remedies arising out of this conviction in the case to which the [open records] request applies."

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. After reviewing the information at issue, it is clear to this office that the information at issue "relates" to the pending habeas corpus action. The requested records therefore may be withheld pursuant to section 552.103.<sup>3</sup>

In reaching this conclusion, however, we assume that none of the records at issue have previously been made available to the criminal defendant or any of his attorneys, either during the course of the defendant's incarceration, prosecution, or appeal. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). To the extent the defendant or his attorneys have seen or had access to these records, there would be no justification for now withholding such information from the current requestor pursuant to section 552.103(a).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous

---

<sup>3</sup>Because we resolve your request under section 552.103, we need not discuss at this time the applicability of the other exceptions you raised.

determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Karen Hattaway". The signature is written in a cursive, flowing style.

Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/RWP/ch

Ref.: ID# 112323

Enclosures: Submitted documents

cc: Ms. Suzanne R. Chauvin  
Akin, Gump, Strauss, Hauer & Feld, L.L.P.  
1900 Pennzoil Place - South Tower  
711 Louisiana Street  
Houston, Texas 77002  
(w/o enclosures)